TESTIMONY OF

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MAINE DEPARTMENT OF ENVIRONMENTAL PROTECTION

SPEAKING IN SUPPORT OF L. D. 1866

AN ACT RELATING TO STORM WATER MANAGEMENT

BEFORE THE

JOINT STANDING COMMITTEE

ON

NATURAL RESOURCES

INTRODUCED BY SENATOR MARTIN OF AROOSTOOK

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Senator Martin, Representative Koffman and Members of the Natural Resources Committee, I am Andrew Fisk, director of the Bureau of Land and Water Quality at the Department of Environmental Protection, speaking in support of L.D. 1866.

As the committee will recall, we recently presented a report to you with recommendations for improving the effectiveness of stormwater management in Maine. The report included recommendations for changes to the Stormwater Law, which appear before you now in L.D. 1866. These recommendations were developed with extensive input from a stakeholder group of more than 30 people, who met monthly between May 2003 and January 2004. While we did not ask for consensus from the group on the

recommendations, we did reach broad agreement on four guiding principles for the Department to follow in their development. They are that:

1. Stormwater standards should result in meaningful protection; i.e., they should accomplish protection without imposing unnecessary requirements;
2. Stormwater standards should not contribute to sprawl;
3. Stormwater standards should be understandable. They should be written in plain English and not be overly complex; and
4. Stormwater standards should not conflict with other major environmental initiatives.

We are proposing three changes to the Stormwater Law and one change to the Erosion & Sedimentation Control Law. All of these statutory changes are in keeping with these principles. There is also an amendment we are proposing to the original bill concerning agricultural manure pits that I will discuss at the end of my testimony.

Please note that the changes we are presenting to you today are directly related to, and necessary for, major substantive rulemaking that is being developed with this stakeholder group. Indeed, we have just released a revised package of draft rules to this group yesterday that build on the principles above and anticipate our recommended statutory changes. We are confident that we have a very good set of draft rules that are very significant improvements over the existing rules, and even earlier draft proposals. We will be presenting these draft rules to the stakeholders this coming Monday and will be able to update you on their reaction at Tuesday's work session on this bill.

Let's go over the statutory change and their rationales.

Section 1 of the bill would modify the Erosion & Sedimentation Control Law to limit chronically eroding sites to those within "most at risk" watersheds that were designated in 1997. There are approximately 250 such lake watersheds and seven such coastal watersheds. We feel this is important because if we designate additional "most at

risk" watersheds in the future, there should be advance notice to property owners in those watersheds that erosion on older development sites will be subject to the E&SC Law. The E&SC law provides for all watersheds to be subject to this provision in 2010, so those eroding sites will still need to be addressed in order to be in compliance over the long term.

Section 2 of the bill would change the threshold for jurisdiction under the Stormwater Law to a one-acre disturbance rather than using the multi-tiered thresholds in the current law. The current thresholds are: 20,000 square feet of impervious area or 5 acres of disturbed area in watersheds designated as "most at risk from new development," and 1 acre of impervious area or 5 acres disturbed area in the rest of the organized portion of the State.

A one-acre threshold is more easily understood by the public, it is simpler for the Department to administer, and it will be more consistent with the one-acre disturbance threshold in the NPDES Stormwater Program that DEP is also administering.

If this change is enacted, the Department would propose in rule that projects with between 1 and 5 acres of developed area, but where less than 1 acre is actually impervious area be eligible for "permit by rule." Permit by rule standards would be similar to those that now apply under our Maine Construction General Permit (MCGP) and notification requirements would be combined where both permits applied. We would also look into other ways to consolidate these programs, including the assessment of only one permit fee.

Section 3 of the bill would amend the Stormwater Law so that water quality protection would be required for projects in all regulated area of the State, focusing first on erosion and sedimentation control, housekeeping and maintenance activities, then to a simplified standard for actual treatment of water quality coming off a site. Currently, under the Stormwater Law, we cannot require these measures in a watershed, if it is not

designated as “most at risk from development” or “sensitive or threatened.” These basic measures are not expensive, and by using them in the watersheds of our “clean” waters, we can help ensure that they won’t eventually become listed as impaired.

This statutory change is important and one I would like to highlight for your attention. You might be tempted to see this as just another “grab” at regulatory jurisdiction. Let me explain a bit. In the rules that we have released to the stakeholder group we have put our best, and very new, thinking forward on just this point.

Let’s talk about the “little guy” under our new thinking about quality standards, say someone proposing a project that will have under three acres of impervious area, which means they don’t need a Site Location of Development permit. In our prior rules we had what is appearing to be more and more an arbitrary distinction between quality and quantity treatment for many types of projects, such as this example. Now we are putting forward that anywhere in the organized areas of the state, this project would require “resource protection standards” which are designed to meet both quality and quantity standards. We are dropping the need to control peak flows (which is a quantity standard) for these types of projects.

Please take a look at your handouts with the yellow post-it notes if you would. Under the existing rules, this project would more than likely need to put in the detention basins you see on the first page because it would have required control for the peak flow of runoff. These structures are simple enough, but they are relatively costly to build, they need to be maintained, and they don’t provide optimal treatment. Now with the proposal we will roll out next week, an applicant will have the choice of several systems, including an underdrained soil filter to meet the standard. These filter systems are usually cheaper than detention ponds and they typically provide more and better environmental protection.

So, we are going to propose to the stakeholders a way of getting more environmental protection, with simpler requirements using cheaper technology.

Let's look back at our guiding principles:

Meaningful protection – we've reduced the cost and complexity and improved the environmental benefit. We maintain water quality everywhere.

Should not contribute to sprawl – quality standards throughout the organized area of the State treats all waterbodies equally and does not push degradation elsewhere.

Understandable – Our proposal is simpler. There is one standard to meet that doesn't require different designations of watershed types. Outside of impaired waters, we treat all streams the same way. This helps the 28 regulated municipalities with separated storm sewer systems as they can use the State system, instead of needing to create their own program.

Section 4 of the bill would give the Department authority to regulate significant existing sources of stormwater in impaired watersheds. This will be accomplished through rule-making, after the Department has undertaken a Total Maximum Daily Load (TMDL) assessment, which is required by the Federal Clean Water Act for impaired waters. Prior to designating significant existing sources, the Department would adopt, through rule, the list of waters where the Department has determined stormwater runoff to be a primary source of impairment.

For these impaired waters, we must eventually address existing pollution sources, if we are ever to make progress in restoring water quality. The Waste Discharge Law prohibits new discharges that would cause or contribute to a water quality violation. While that prohibition does not technically apply to discharges permitted under the Maine Stormwater Law, the Department has taken the position that these programs should be consistent. For that to be the case, we need to impose very strict standards for new development in those watersheds where urban runoff is the primary cause of the

impairment. However, such strict measures are often expensive, and in some cases, infeasible. And even if implemented, they still won't result in an improvement in the water quality; they would only keep the water from getting more polluted.

While the Department is seeking the authority to regulate existing sources, it is our hope that we will not need to do so in most instances. We hope that municipalities will have an interest in working with existing developments to clean up these impaired waters. In other parts of the country, stormwater utility districts have been formed for that purpose. A major advantage of these districts is that they can ensure that everyone who contributes to a water quality problem, also contributes to fixing it. This approach may make sense in some urban watersheds in Maine, and the Department is interested in assisting any municipality that might want to pursue this. However, there are other approaches that may also work. We encourage municipalities that have waters impaired by urban runoff to develop a local watershed management plan for these waters. The Department will seek to provide incentives for municipalities to address existing sources, through grants and through provisions in rule that will reduce the requirements for new development in impaired watersheds if a local watershed management plan has been developed, if it has been approved by the Department and is being implemented.

To look back again at our guiding principles, the proposal to regulate existing sources works to also avoid sprawl by not requiring new development to shoulder all of the burden, and we are proposing requirements that will be site specific and considerate of site constraints and treatment potential.

Section 5 of the bill contains transition language to clarify when a project would be subject to the new threshold provisions described in Section 2.

When we presented our report to you on February 5th, there were several questions raised about what the Department would require for stormwater treatment standards and what the cost of those standards would be. With our request for authority

to regulate existing sources, the question has also been asked about what we might require of existing developments. We have prepared some additional handouts for you, which describe the most common types of treatment practices we expect to see, as well as relative costs. For existing development, we recognize that some options will be impractical. Solutions will always depend on individual circumstances, and will need to consider the amount of pollution attributed to the site, the amount of remediation needed for the water body to meet its classification, and the development's site characteristics.

That said, we have prepared a chart (attached in blue) showing a range of treatment options for a hypothetical existing source with one acre of impervious area. The treatment options and costs are generalized, but are representative and give a good indication of possible costs and outcomes.

We have also heard concern about what the proposed changes would mean with respect to local delegation of the program. The Stormwater Law does provide for delegation of the program to a municipality if it has developed an equivalent program. To date, there are only four municipalities with Stormwater Law capacity: Freeport, Lewiston, Portland and Saco. All of these municipalities conduct reviews of development projects using the size thresholds in the current Stormwater Law. If the proposed changes to the law are enacted, these communities would need to also make changes to the local ordinances. They will certainly be encouraged, but would not be required to maintain their status with respect to delegation of the program.

Whenever we propose changes to a program, there is always concern about what the effect will be on our workload. We do expect a modest increase in workload as a result of the changes, though the overall impact should be lessened because we already are administering the NPDES Construction General Permit Program, and we are looking to consolidate these processes to a large extent. We will also be recommending changes to our stormwater rules that we believe will simplify the review process, saving time not only for applicants, but for our review staff as well. These changes are still under

development, and will be further discussed by the stakeholder group over the next few months, prior to our initiating rule making.

These rules will be back to this Committee for approval next year.

Finally, we also propose one other amendment to deal with a problem that has just come to our attention with respect to agriculture. To deal with requirements under the Maine Nutrient Management Law, farmers are installing manure pits in many locations. In some cases, the size of the disturbance associated with these pits may exceed one acre, and so be subject to stormwater permitting requirements. The current exemption in the Stormwater Law only applies to "normal farming activities, such as clearing of vegetation, plowing, seeding, cultivating, minor drainage and harvesting." We propose to broaden this exemption to include manure pits in this section. Otherwise, farmers will face further delays in carrying out projects that will benefit water quality. We are very comfortable including these structures in an exemption as they are constructed under the supervision of the Natural Resources Conservation Service and to appropriate standards. Indeed the great majority of these structures are uncovered structures that are completely internally drained, so have no runoff potential.

We urge your support of the proposed Stormwater Law revisions. In combination with upcoming rule revisions, they will lead to a much more effective Stormwater Program.

I would be happy to answer any questions.